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November 21, 2007

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

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Case Number: TSO-0476

This Decision concerns the eligibility of XXXXXXXXXXXX (hereinafter referred to as "the individual") for access authorization under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material."¹ For the reasons set forth below, I conclude that the individual should not be granted a security clearance at this time.

I. BACKGROUND

The individual's employer, a Department of Energy (DOE) contractor, requested a security clearance on his behalf. During the ensuing investigation, the individual disclosed, on a Questionnaire for National Security Positions (QNSP) dated March 23, 2005, that he had used marijuana approximately 20 times between January 1997 and October 2004. During a Personnel Security Interview (PSI) on September 21, 2006, the individual stated that his last usage of the drug occurred in August 2006. PSI at 11.

After reviewing the information generated by its investigation, the local security office determined that derogatory information existed that cast into doubt the individual's eligibility for a security clearance. They informed him of their determination in a letter that set forth in detail the DOE's security concerns and the reasons for those concerns. I will hereinafter refer to this letter as the Notification Letter. The Notification Letter also informed the individual that he was entitled to a hearing before a Hearing Officer in order to resolve the substantial doubt concerning his eligibility for access authorization.

The individual requested a hearing on this matter. The local security office forwarded this request to the Office of Hearings and Appeals and I was appointed the Hearing Officer. The DOE introduced eight exhibits into the record of this proceeding. The individual presented the testimony of a

¹An access authorization is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5. Such authorization will be referred to in this Decision as access authorization or a security clearance.

psychiatrist, a friend, a co-worker, his supervisor, and of his fiancée. He also testified on his own behalf, and introduced the psychiatrist's written report as an exhibit in this proceeding.

II. THE NOTIFICATION LETTER

As indicated above, the Notification Letter included a statement of derogatory information that created a substantial doubt as to the individual's eligibility to hold a clearance. This information pertains to paragraphs (k) and (l) of the criteria for eligibility for access to classified matter or special nuclear material set forth at 10 C.F.R. § 710.8. Paragraph (k) pertains to information indicating that the individual has "sold, transferred, possessed, used, or experimented with a . . . substance listed in the Schedule of Controlled Substances established pursuant to section 202 of the Controlled Substances Act of 1970 (such as marijuana, cocaine, amphetamines, . . . etc.)" except as prescribed by a physician or otherwise authorized by federal law. Under this paragraph, the Letter cites the individual's statements during the PSI that he used marijuana from January 1997 to August 2006, that he purchased marijuana in 1998 and 1999 while in Amsterdam, Holland, that he used psychoactive mushrooms in 1998, that he is aware that marijuana usage is illegal, and that he associates with people who use illegal drugs.

Pursuant to paragraph (l), information is derogatory if it indicates that the individual "has engaged in any unusual conduct or is subject to any circumstances which tend to show that [he] is not honest, reliable, or trustworthy; or which furnishes reason to believe that [he] may be subject to pressure, coercion, exploitation or duress which may cause [him] to act contrary to the best interests of the national security." 10 C.F.R. § 710.8(l). As support for this paragraph, the Letter states that on January 19, 2005, the individual signed a Security Acknowledgment and a DOE Clearance Criteria Statement, which certified that the individual understood that involvement with illegal drugs could raise doubt as to his eligibility for a security clearance. The letter further states that despite these certifications, the individual "used marijuana in August of 2006, while being processed for a DOE access authorization." DOE Exhibit 1 at 2.

III. REGULATORY STANDARDS

The criteria for determining eligibility for security clearances set forth at 10 C.F.R. Part 710 dictate that in these proceedings, a Hearing Officer must undertake a careful review of all of the relevant facts and circumstances, and make a "common-sense judgment . . . after consideration of all relevant information." 10 C.F.R. § 710.7(a). I must therefore consider all information, favorable or unfavorable, that has a bearing on the question of whether restoring the individual's security clearance would compromise national security concerns. Specifically, the regulations compel me to consider the nature, extent, and seriousness of the individual's conduct; the circumstances surrounding his conduct; the frequency and recency of the conduct; the age and maturity of the individual at the time of the conduct; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the likelihood of continuation or recurrence of the conduct; and any other relevant and material factors. 10 C.F.R. § 710.7(c).

A DOE administrative proceeding under 10 C.F.R. Part 710 is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization."

10 C.F.R. § 710.21(b)(6). Once the DOE has made a showing of derogatory information raising security concerns, the burden is on the individual to produce evidence sufficient to convince the DOE that granting access authorization “will not endanger the common defense and security and will be clearly consistent with the national interest.” 10 C.F.R. § 710.27(d); *see also Personnel Security Hearing*, Case No. VSO-0013, 24 DOE ¶ 82,752 at 85,511 (1995) (*affirmed* by OSA, 1996), and cases cited therein. The regulations further instruct me to resolve any doubts concerning the individual’s eligibility for access authorization in favor of the national security. 10 C.F.R. § 710.7(a).

IV. FINDINGS OF FACT AND ANALYSIS

A. The DOE’s Security Concerns

After reviewing the entire record in this matter, I find that the DOE has made a proper showing of derogatory information raising legitimate security concerns under paragraphs (k) and (l) of the criteria for eligibility for access to classified matter or special nuclear material. As previously mentioned, the individual has admitted to smoking marijuana on multiple occasions between 1997 and 2006. Such illegal drug usage raises significant security concerns. A clearance holder who is under the influence of a psychoactive substance may be more likely to commit a breach of security because of impaired judgement. Moreover, illegal drug usage may be indicative of a disturbing willingness to violate laws, rules and regulations. Using marijuana after signing certifications acknowledging his understanding that such usage could raise doubts about his eligibility for a clearance could also indicate a willingness to disobey security requirements.

B. The Hearing

The individual attempted to address these serious concerns at the hearing. He testified that he graduated from college in 1999 and, referring to his estimate during the PSI of 20 usages of marijuana between 1997 and 2006, he stated that the vast majority of these instances occurred during his undergraduate years. Hearing Transcript (Tr.) at 9, 14. His usage occurred in “social settings,” with the drug always being provided by someone else. Tr. at 16. It was also during this period that his mushroom usage occurred. The individual testified that although it was his intent at the time to use psychoactive mushrooms, he did not believe that the mushrooms were, in fact, hallucinogenic because he did not feel any effects. Tr. at 18.

The individual then discussed his August 2006 marijuana usage. He stated that it occurred during a vacation in Thailand. When he arrived in Bangkok, he wandered about the city and noticed that “people were freely smoking pot, open air, on the street.” Tr. at 22. After traveling by boat to a location at which he wanted to do some rock-climbing, he noticed at a nearby village that people were again openly smoking marijuana. While dining at a restaurant in the village that evening, he took “one puff” of a marijuana cigarette that was being passed around the table. Tr. at 21-24. He testified that it was his belief at the time that, while such usage might “complicate things,” he “didn’t think that it would impact necessarily the processing of [his] clearance.” Tr. at 24. This is because he believed that there were “playing rules” before the granting of a clearance where an occasional use of marijuana might be excused as long as he was honest and forthcoming about it, and “playing rules” after the granting of a clearance, where such usage was strictly forbidden and could cause his

clearance to be revoked. Tr. at 23. He stated that this belief was based on the fact that during a 2004 interview with the Office of Personnel Management, he had admitted to smoking marijuana with no apparent impact on the processing of his clearance. *Id.* He specifically recalled that he later called the interviewer to ask how “everything was processing,” and she said “Fine” and “If only all cases were as easy as this.” *Id.*

Next, the individual testified about his purchase and usage of marijuana in 1998 and 1999 in Amsterdam, Holland. He stated that he had spent most of the summer of 1998 studying in a laboratory in Germany, and that he and a friend who was studying in France decided to tour Berlin and Amsterdam over the course of several days. While in Amsterdam, they “went into one of these coffee-shop-type of establishments and we bought marijuana together.” Tr. at 26. In 1999, after approximately a month of traveling through Europe with some college roommates, the group stopped in Amsterdam and visited another one of the “coffee-shop-type” places, where the individual again purchased and used marijuana. *Id.* The individual added that on both occasions, they purchased the minimum amount, one marijuana cigarette.

Prior to August 2006, the individual’s most recent marijuana usage occurred in October 2004 during a camping trip with his current fiancée. He added that, to his knowledge, she no longer smokes marijuana, she has not offered it to him since the trip, and they have not smoked marijuana together since that time. He further stated that they have both matured since then, and that, whereas she was a student in 2004, she is now a practicing attorney “with very compelling reasons not to do marijuana.” Tr. at 43-44.

The individual then addressed statements that he made during the 2006 PSI to the effect that he sometimes associates with people who use drugs. He explained that he made those statements because he is in the company of rock climbers and skiers when he engages in those activities, and he assumed that some who engage in those activities periodically use illegal drugs. Tr. at 31-32. He said that the statements were basically speculation on his part, and were not based on the actual witnessing of drug usage. *Id.*

Regarding the Security Acknowledgment and the Clearance Criteria Statement that he signed on January 19, 2005, the individual said that he did not completely understand the documents that he was signing. As “I remember the situation,” he testified, “it was after the interview that I had with the Office of Personnel Management (OPM) representative,” and “I thought that I was signing something that affirmed” that the information that he had provided during that interview was accurate. Tr. at 34. He also said that he thought the documents “established the ground rules for when you have a clearance.” Tr. at 35. However, on cross-examination, the DOE counsel pointed out that the OPM investigator’s report indicates that the individual’s interview occurred “under unsworn declaration on 05/11/05.” Tr. at 51-52, *quoting* DOE Exhibit 4. The individual responded that although it was now apparent to him that he had not signed the documents after the OPM interview, he had honestly thought that he had done so, and that he does not remember the circumstances surrounding the signings, other than that he signed the documents without understanding their true import. Tr. at 52, 54, 71. The individual concluded by saying that he has not used any illegal drug since August 2006 and that he has no intention of ever using illegal drugs again. Tr. at 39, 47.

The individual then presented the testimony of a local psychiatrist. The psychiatrist stated that he evaluated the individual in March 2007, with a particular focus on issues relating to his character, honesty and substance abuse potential. Tr. at 76. In conducting this evaluation, the psychiatrist administered a battery of tests to the individual, including the Personality Assessment Inventory and the Substance Abuse Subtle Screening Inventory. He summarized the results of these tests by saying that they showed that “there was a very low probability of there being any type of diagnosable substance use disorder” or any type of disorder “which might predispose a person to be dishonest or deceitful or untrustworthy.” Tr. at 78-79. In fact, the psychiatrist went on to say that the tests have certain “validity indicators” which are designed to detect dishonest subjects, Tr. at 80, and that the individual’s performance on those tests shows that he “is precisely the type of individual who . . . is honest and trustworthy and . . . deserving of holding an access authorization . . .” Tr. at 81.

The individual’s fiancée testified that it was she who brought along the marijuana on the 2004 camping trip, and that it was just enough for one marijuana cigarette. Tr. at 112. They don’t use marijuana now and, to her knowledge, the individual did not use the drug from 2004 until August 2006. Tr. at 114. Concerning the August 2006 usage in Thailand, she said that she did not smoke marijuana on that occasion, but that “a lot of people were smoking pot at that” and other restaurants, and that based on the openness of usage, she would have thought that it was legal. Tr. at 114. Finally, the individual’s friend, co-worker and supervisor all testified that they have never seen any indications of illegal drug usage on his part, and that he is an honest, trustworthy and reliable person. Tr. at 104, 107, 152, 154, 170.

C. Analysis

Although the evidence presented by the individual does establish certain mitigating factors, I do not believe that he has successfully resolved the DOE’s security concerns under either paragraph (k) or paragraph (l). As an initial matter, based on the psychiatrist’s testimony and the individual’s infrequent marijuana usage since graduating from college in 1999, I conclude that the individual does not suffer from a substance use disorder, and I find this to be of significant mitigating value. Also significant was the individual’s candor and honesty about his drug usage. It is quite possible that this administrative review proceeding would not have occurred if not for the individual’s honest answers about his recent drug usage. However, the mitigating value of this candor is diminished by the fact that honesty is required of applicants for, and holders of, security clearances. .

Despite these mitigating factors, I am not convinced that the individual will permanently refrain from future marijuana usage. First, unlike previous cases in which Hearing Officers have found mitigation in a very limited drug usage history, *see, e.g., Personnel Security Hearing*, Case No. TSO-0230 (January 31, 2007) (four total usages); *Personnel Security Hearing*, Case No. TSO-0310 (May 19, 2006 (usage was “isolated incident”)), or in the passage of a significant amount of time since the last usage, *see, e.g., Personnel Security Hearing*, Case No. TSO-0192 (November 9, 2006) (two years); *Personnel Security Hearing*, Case No. TSO-0103 (September 14, 2004) (two-and-one-half years), the individual in this case has admitted to smoking marijuana approximately 20 times over a ten-year period, with the last usage occurring only nine months prior to the hearing. Moreover, there is no indication in the record that the individual has undergone substance abuse treatment, or that any other events occurred in those nine months that would make a return to marijuana use less likely.

See, e.g., Personnel Security Hearing, Case No. VSO-0088, July 17, 1996 (nine months of abstinence plus successful completion of substance abuse program adequate to show rehabilitation). The individual did state that it was his intention to permanently abstain from all future marijuana use. However, I note that the individual made a similar statement during his May 2005 interview with the OPM investigator, and then smoked marijuana again approximately fifteen months later. DOE Exhibit 4 at 1; Tr. at 37-38. Given the totality of the circumstances, a nine-month period of abstinence and the individual's assurances about his future intentions are simply insufficient to convince me that his chances of further marijuana usage are remote.

The individual's actions also demonstrate a disturbing lack of regard for the law and for security procedures. He attempted to explain his usage of marijuana in August 2006 after signing the Security Acknowledgment and the Clearance Criteria Statement by saying that he thought that there were different rules regarding marijuana use before and after the granting of a clearance, and that he signed the documents without fully reading and completely understanding their contents. However, even if these assertions are true, they do not adequately mitigate the DOE's concerns under paragraph (l). First, even if the individual was not aware that marijuana usage during the processing of his clearance was potentially disqualifying, I believe that he knew that such a usage would be of concern to DOE Security. He had filled out a QNSP in which the DOE specifically asked about recent drug usage. Furthermore, he testified that he knew that such usage might "complicate things." Tr. at 24. That he used marijuana in August 2006 despite this knowledge suggests a careless attitude towards security concerns. In addition, completely aside from security rules and regulations, he was certainly aware that his multiple uses of the drug in the United States were illegal. Finally, the fact that he signed security documents informing him that further illegal drug usage could render him ineligible for a clearance, and then used marijuana anyway, is an indication of either carelessness for signing important documents that he did not fully read, or blatant disregard for DOE drug policy. In either case, his actions reflected a lack of concern for legal and security requirements. The individual has failed to adequately address the DOE's security concerns under paragraph (l).

V. CONCLUSION

Based on the factors discussed above, I find that valid security concerns remain under paragraphs (k) and (l). Accordingly, I conclude that the individual has not demonstrated that granting him a clearance would not endanger the common defense and would be clearly consistent with the national interest. Accordingly, the individual should not be granted access authorization at this time. The individual may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

Robert B. Palmer
Hearing Officer
Office of Hearings and Appeals

Date: November 21, 2007